

APPENDIX F

NARUC LEGISLATIVE TASK FORCE REPORT ON **Federalism and Telecom**



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I. INTRODUCTION

In response to congressional interest in reexamining the Telecom Act, NARUC formed a Telecom Legislative Task Force in 2004 and approved a resolution at our February 2005 meeting suggesting that any revision of the Act should:

- Promote innovative platforms, applications and services in a technology-neutral manner;
- Consider the relative interests and abilities of the State¹ and federal governments when assigning regulatory functions.
- Preserve the States' particular abilities to ensure their core public interests;
- Preserve customer access to the content of their choice without interference by the service provider;
- Ensure timely resolution of policy issues important to consumers and the market;
- Protect the interests of low income, high cost areas, and customers with special needs;
- Provide responsive and effective consumer protection; and
- Focus regulation only on those markets where there is an identified market failure.

An area of particular concern has been the evolving nature of federalism. While telephone customers have been making calls across State lines since at least 1884, the role of State commissions has evolved over time to match the structure of the market and the needs of consumers. For many decades, a primary State commission task was to restrain the market power of a single national phone company (presumably with many centralized functions) by holding down local rates, preventing harmful cross-subsidies and requiring equitable build-out of facilities. More recently, States played a central role in facilitating wholesale markets for incumbent phone loops and other essential facilities for local competition, and developed sophisticated consumer hotlines to provide a human voice and individual attention to frustrated consumers.

As the communications market shifts again, NARUC has explored a pragmatic analysis that looks to the core competencies of agencies at each level of

¹ The term "State" throughout this document includes all fifty States, the District of Columbia, and all U.S. territories, including Puerto Rico and the U.S. Virgin Islands.

government – State, local and federal. While some State oversight roles will undoubtedly diminish where local competition grows, others will remain essential, especially as large parts of the market, including VOIP, still seek access to the Public-Switched Telephone Network (PSTN). In many cases, State jurisdiction need not rely on a readily separable “intrastate” component of a service. For example, effective consumer protection depends largely on where the consumer is domiciled, regardless of whether calls are placed to in-state or out-of-State destinations. Requests to interconnect depend on where the relevant facilities are located. Requests to receive universal service funds or to be designated as an Eligible Telecom Carrier (“ETC”) for such funds depend on the geographic study area where service will be provided.

Ultimately, decisions about jurisdiction and oversight should be linked not to the particular technology used, but to the salient features of a particular service, such as whether it is competitive and how consumers and small businesses depend on it. States commissions excel at delivering responsive consumer protection, assessing market power, setting just and reasonable rates for carriers with market power, providing fact-based arbitration and adjudication. States are also the “laboratories of democracy” for encouraging availability of new services and meeting policy challenges at the grassroots level. An effective, pragmatic approach to federalism, in the IP world or otherwise, should recognize those strengths.

II. BEYOND THE “SILOS” – TECHNOLOGY NEUTRALITY

Regardless of which level of government is responsible, a technology-neutral approach to oversight would still require at least three broad categories of services:

- **Interconnected market power services**, which would be subject to economic regulation, even if offered by providers that also provide some competitive services. (e.g.: many ILECs);
- **Competitive interconnected services** that are still expected to meet social obligations, such as 911/E-911 and equitable contribution to USF, as well as traditional telecom regulation requirements like number porting and conservation (e.g.: wireless telephony, interconnected VOIP services, CLECs, etc.);
- **Other services and applications** (e.g.: voice-enabled chat rooms and video games) that are beyond the scope of most telecom regulation, although subject to wiretapping, general business and contract regulation.

To classify particular services, policymakers must ultimately find criteria that recognize legitimate consumer expectations and can stand the test of time as the underlying technologies continue to evolve. A number of States have taken steps through their commissions or legislatures to deregulate telephone service where

incumbents were judged to no longer exercise significant market power. This paper affirms the flexibility of those States to adapt to changing market conditions and deregulate as appropriate.

Type of service	Functional oversight examples (non-exhaustive)	Attributes	Possible criteria
Interconnected market power services	<ul style="list-style-type: none"> • Economic regs. • E-911, numbering, porting, consumer protection, disabled access, service quality, etc. Fed/State universal service 	Basic telephone service or a functional substitute and customers in that market have no or few alternatives	<ul style="list-style-type: none"> • Same as “competitive interconnected” except carrier has market power and facilities are critical infrastructure.
Competitive interconnected services	<ul style="list-style-type: none"> • E-911, numbering, porting, interconnection, disabled access, etc. • Some service quality (outages, etc) • Fed/State universal service 	<ul style="list-style-type: none"> • Basic telephone service or a functional substitute for it. • Consumer expectations include 911, etc. 	<ul style="list-style-type: none"> • Interconnected for calling general public (PSTN and beyond) • Ongoing service relationship
Other services & applications	<ul style="list-style-type: none"> • General business, criminal, contract, tort, labor and employment law, etc. 	Doesn’t substitute for basic telephone service.	<ul style="list-style-type: none"> • Closed networks • Applications where no ongoing relationship is maintained

Regulatory forbearance:

Especially when it comes to economic regulation, the concept of mandatory or permissive forbearance recognizes that market conditions change over time and that certain forms of oversight could be eliminated, or reimposed, as necessary. For

example, States might forbear where competitive conditions exist, but retain the “backstop authority” for cases where there is an identified market failure.

III. FEDERALISM

A. End-point jurisdiction and functional jurisdiction

“End-point jurisdiction” describes the traditional method of allocating responsibility over telecommunications traffic into either the State or federal jurisdictions based upon the locations of the two end users on a switched call.² Legislative Task Force members agreed that for purposes of considering a large-scale revision of the Telecom Act, end-point jurisdiction should not be pursued as the basis for State oversight, especially with regard to newer services like VOIP. It is increasingly difficult to isolate the end-points of calls, and perhaps unnecessary for many regulatory functions where cost allocation is not required. An important caveat is that end-point jurisdiction should only be reconsidered in the context of replacing it with an appropriate alternate basis for allocating jurisdiction, such as functional jurisdiction. Eliminating current jurisdictional underpinnings without providing for many vital State oversight roles would be bad for consumers, public safety, competition and universal service.

NARUC prefers a “functional-focus” model of jurisdiction that suggests Congress should grant rulemaking and/or enforcement authority over specific regulatory functions. For example, States might be granted sole authority to exercise specific pricing and consumer protection functions, regardless of call endpoints. “Functional jurisdiction” describes a method of allocating State and federal responsibility over telecommunications based on analysis of the characteristics of each governmental function exercised, and of the comparative abilities of different levels of government to exercise the function successfully. It gives little or no weight to the nature of the communications equipment or medium used for transmission, the format of or technology used for the communication, the legal or historical status of the provider, or the end user’s location or purpose.

NARUC prefers that functional State roles should be as neutral to technology and provider as possible. NARUC has rejected several other models:

- a. Application focus, which would limit State authority to “voice” and possibly other applications.
- b. Network focus, which would limit State authority to circuit-switched telephony and restrict State authority over IP-enabled services.
- c. Provider focus, which would limit State authority to certain providers, such as ILECs.

² Where a private line is connected to the switched network, the point of entry is often used in lieu of customer location.

End-point jurisdiction is linked by many to traditional economic regulation designed to restrain abuse of market power. This includes setting retail rates and preventing cross subsidies. The cost allocation and separations process associated with end-point jurisdiction has been very important in determining appropriate access charges. From a functional perspective, States have implemented most (but not all) economic regulation.

Many non-economic functions have already fallen largely to one jurisdiction or the other, independent of end-point jurisdictional rules. For example, management of NANP numbers has been a federal activity (with much number conservation and porting handled by States), while most service quality regulation has been done at the State level, even though in both cases interstate and intrastate communications are affected by the regulatory activity. A functional jurisdictional model would recognize these practical choices and assign functions on the basis of core competencies and relative interests at each level of government.

B. Original and Delegated Jurisdiction

States should continue to retain original, non-delegated, jurisdiction for some core functions. States are particularly suited for:

- d. Responsive management of consumer relationships, including consumer protection activities;
- e. Managing retail issues, particularly over basic telephone service, where companies have market power; and
- f. Conducting fact-intensive evidentiary proceedings;
- g. Writing rules to reflect local conditions or community preferences, especially those that arise out of consumer complaints or unique telecom market structures;
- h. Implementing federal policies and tailoring them to local conditions.

Delegated jurisdiction is appropriate where State commissions are implementing federal, national goals, such as number conservation and wholesale market rules.

IV. FEDERALISM – CORE COMPETENCIES AND FUNCTIONAL ROLES

The charts below attempt to synthesize input from commissioners as well as previous NARUC positions and sources regarding which regulatory functions are appropriate at the State level.

A. Consumer Protection:

A “one-stop-shop” for consumer complaints: Consumers should have a single place in their State to take complaints and receive individual attention and should not get the runaround based on the particular technology used.

A floor, not a ceiling: Blanket preemption on consumer affairs will restrict consumer redress in the future. While federal standards provide a useful complement to State actions, consumers should NOT have to wait for federal rulemakings every time a new issue arises.

Flexibility for novel issues and robust enforcement: States have frequently been first to provide consumer relief when novel issues emerged like cramming or modem hijacking, with flexibility to stop bad practices when the company considered penalties the “cost of doing business.” When novel issues arise in the States (and they will), the law of unintended consequences should NOT be construed against the consumer.

	FEDERAL	STATE/LOCAL
Service quality	Collect data nationally from switched network providers. Resolve conflicts among State service quality rules applicable to multistate carriers with integrated operations.	Establish and enforce retail service quality and reliability standards, especially for carriers with market power and those that receive universal service support. Sort out service outages, especially where more than one provider is involved and they are blaming each
Consumer complaints	Adjudicate consumer complaints or refer them to States.	Adjudicate consumer complaints for all services with flexibility and authority to address novel issues as they arise.

Terms and conditions of service.	Establish minimum standards for consumer protection.	Enforce federal standards and adopt supplemental standards where appropriate.
Fraud and other “bad actors”	Set minimum standards.	Enforce federal standards and set State standards where appropriate, including for new abuses like “modem hijacking.”
Consumer privacy	Set federal CPNI rules.	Enforce CPNI rules and supplement privacy rules where appropriate.
Market monitoring	Aggregate State data and collect market monitoring data on a national scale.	Collect data and monitor service quality, outages, competition and other functions in the State.
Registration / certification	Administer Sec. 214 requirements for discontinuance of service, transfer of plant, etc.	Issue Certificates of Public Convenience and Necessity (CPCNs) for carriers operating critical infrastructure facilities in a State. Administer registration requirements for other carriers in a State to facilitate number management, consumer complaint resolution and other functions

B. Public Safety:

	FEDERAL	STATE/LOCAL
911 and E-911 provision.	Establish duty to provide 911/E-911 for wireless, VOIP, etc.	Require 911/E-911 for wireline telephony and enforce federal and State 911/E-911 requirements.

911 and E-911 Interconnection and fees.	<p>Define services required to provide 911 and E-911 functionality.</p> <p>Mandate non-discriminatory access and interconnection for 911 providers.</p>	<p>Arbitrate non-discriminatory interconnection to E-911 call centers and other related elements.</p> <p>Establish non-discriminatory funding mechanisms, to be paid by all providers that are required to provide 911/E-911 services.</p>
Plant safety and network reliability	Network reliability guidelines and oversight.	Ensuring new facilities are installed in a safe manner and existing facilities do not post a safety hazard.

C. Competition & Wholesale Markets:

	FEDERAL	STATE/LOCAL
Interconnection	Establish general rules for non-discriminatory network access and interconnection.	State commissions arbitrate interconnection agreements and make specific interpretations of rules.

<p>Intercarrier compensation</p>	<p>To eliminate incentives for arbitrage, carriers should charge a uniform access rate to all other carriers (LECs, wireless, VOIP, IXC), regardless of who makes the call or where it originates geographically.</p> <p>That uniform rate should reflect the underlying costs of the carrier charging it. A carrier with higher underlying costs may charge higher access charges, but must charge them uniformly.</p> <p>Carriers may negotiate private arrangements voluntarily, including bill-and-keep, but bill-and-keep should not be mandated.</p> <p>The FCC should revisit cost allocation for regulated and non-regulated services.</p>	<p>To eliminate incentives for arbitrage, carriers should charge a uniform access rate to all other carriers (LECs, wireless, VOIP, IXC), regardless of who makes the call or where it originates geographically.</p> <p>That uniform rate should reflect the underlying costs of the carrier charging it. A carrier with higher underlying costs may charge higher access charges, but must charge them uniformly.</p> <p>State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.</p> <p>Where a default formula for access charges is used, carriers should have the opportunity to demonstrate their higher costs to the State commission.</p> <p>The NARUC Intercarrier Compensation Task Force has produced successive drafts of a</p>
<p>Numbering and porting</p>	<p>FCC manages numbering resources at the national level and sets general rules for porting, number conservation, etc.</p>	<p>Manage area code splits, pooling and other number conservation.</p> <p>Enforce/manage LNP and other porting.</p>
<p>Competition in retail markets</p>	<p>For some types of services, the federal government may establish a rebuttable presumption of competitiveness, such as with</p>	<p>States determine when retail markets are competitive. Where market power exists, State may regulate rates or forbear from regulation (and re-regulate if</p>

Competition in wholesale markets	FCC provides consistent standards for assessing market power in wholesale markets. FCC determines competitiveness and appropriate economic regulation of major	Using federal standards, States determine competitiveness and appropriate economic regulation of wholesale communications links and services not assigned to FCC.
Small enterprise UNEs	FCC discharges duties under Section 251.	State commissions set UNE prices and arbitrate interconnection.
Restricting anti-competitive behavior.	Broadly define and enforce against anti-competitive behavior.	States enforce against “port blocking,” tying and other issues.

D. Universal Service:

	FEDERAL	STATE/LOCAL
Collecting Universal Service Funds.	FCC collects funds based on a broad-based collection mechanism, either all revenues (intrastate and interstate) or telephone numbers, connections, or a hybrid of the two.	Assessment authority for State reforms is co-extensive with the federal. If FCC's authority is expanded to assess intrastate revenues (i.e., total revenue), then State assessment authority is similarly expanded (to cover interstate revenues). Alternatively, if the basis of USF is changed to telephone numbers, connections, or a hybrid, then State assessment will also be permissive
Distributing / allocating federal USF funds.	FCC allocates funds on a technology-neutral basis.	States have primary responsibility for designating ETCs.
State universal service	As above, clarify that any expansion of federal collection authority does not disturb	States operate independent universal service programs to address State needs and

V. APPELLATE RELATIONSHIPS

Federal law should authorize State commissions to make adjudicative decisions in all circumstances where there are questions of fact or a requirement to apply general rules to specific situations with particularity. Where State commissions have made findings of fact after hearings, those facts should not be disturbed on appeal unless they are clearly erroneous. This is similar to the manner in which circuit courts review FCC decisions. Federal law should clarify that when a State commission adjudicates a dispute arising under federal law, e.g., an interconnection agreement, the State commission is not deemed to have waived its 11th amendment sovereign immunity.

When a State commission has decided a case:

- Under State authority, appeals should generally be to State courts, and State policy decisions should be accorded deference unless they improperly intrude into federally protected interests.
- Under delegated authority, appeals should lie either to federal circuit courts, similar to appeals from the FCC, or to State appellate courts. In appeals to federal courts, States should not be named as defendants unless they have expressly waived sovereign immunity.
- Also, to clarify federal law issues, State commissions should have a mechanism that allows them to, in the midst of a proceeding to “certify” a central question of federal law to the FCC for a decision before concluding the State proceeding. Also, the FCC can act as a backstop where a State fails to act on federally-designated duties.

VI. APPORTIONMENT OF JURISDICTION AMONG STATES

Where intrastate telecommunications is not the basis of jurisdiction, States will need some other rational means of apportioning jurisdiction among them. Possible means of apportionment include:

- Domicile of the consumer for most consumer protection functions; or
- Geographic assignment of the NANP telephone number as a proxy for where the customer is most likely located.
- Location of facilities to which the requesting carrier would like to interconnect.
- Geographic study area in which the carrier would like to receive funds to provide service.

A parallel example from taxation is the Mobile Telecommunications Sourcing Act, which requires customers to choose a billing address when they sign up for a

wireless phone account, and pay taxes based on the State and municipal authority governing that address. For example, customers can have their cell phone bills sent to their work address or home address. The choice would control which E-911 fees might apply.

Telecom carriers are currently required to seek a Certificate of Public Convenience and Necessity (CPCN) when they provide service in a State. Such requirements and the accompanying scrutiny continue to be appropriate for carriers that operate critical infrastructure facilities within a State. For other carriers in the “competitive interconnected” category, a less stringent State registration process is appropriate to facilitate number conservation, consumer complaint resolution and other functions.

Where States are given authority to regulate a telecommunications activity, States should also be able to determine the manner in which State government will exercise that authority. Specifically, States should be able to decide whether that State authority will be exercised by judicial agencies (such as through consumer protection laws) or by administrative agencies (such as utility commissions).

VII. VIDEO FRANCHISING:

Eleven State commissions representing more than 15% of the US population have oversight responsibilities, whether through a Statewide franchise or by overseeing the negotiation of local franchise agreements. NARUC is interested in promoting the entry of new competitors into the video marketplace. State and local governments provide vital functions to the video market, such as managing rights-of-way, public, educational and government (“PEG”) channels, build-out requirements, anti-redlining requirements, franchise fees and other public obligations. As we have with VOIP, wireless and other issues, NARUC will explore a “first principles” approach that looks at the reasons behind regulations and requirements on all video providers.